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Department of Water Resources

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

In the matter of:

A&B IRRIGATION DISTRICT and FALLS  
IRRIGATION DISTRICT

Complainants,

vs.

RONALD D. CARLSON, WATERMASTER,  
WATER DISTRICT 01, STATE OF IDAHO

Respondent,

and

MITIGATION, INC.

Intervenor.

HEARING OFFICER'S  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND  
RECOMMENDATIONS FOR ENTRY  
OF FINAL ORDER

**Introduction**

This matter was heard before departmental hearing officer D. Duff McKee on February 16, 17 and 18, 2005, in conference facilities at the Idaho Department of Water Resources (IDWR) building in Boise, pursuant to notice. All parties were present in person or through representatives from the respective organizations, and with counsel. The complaining parties A&B Irrigation District (A&B) and Falls Irrigation District (Falls) were represented by Roger D. Ling, of Ling Robinson & Walker, Rupert, Idaho. The respondent Ronald D. Carlson, Watermaster of Water District No. 1 of the State of Idaho (Carlson or Watermaster) was

represented by Deputy Attorney General David J. Barber of Boise, Idaho. The intervenor Mitigation, Inc. (Mitigation) was represented by Jerry R. Rigby, of Rigby Thatcher Andrus Rigby Kam & Moeller, Rexberg, Idaho.

As a preliminary matter, the parties stipulated to the admission of 56 exhibits contained in a three ring binder. In addition, the parties supplied the hearing officer with a stipulation of admitted facts. At the evidentiary hearing, 12 witnesses were presented for examination and cross examination by the parties. The testimony was recorded on tape, now in the possession of the Idaho Department of Water Resources. At the conclusion of the evidence, the parties waived summation and advised the hearing officer that the matter was submitted on the stipulated facts, the exhibits and the testimony offered.

Therefore, being fully advised in the premises, and the matter being submitted for determination, the hearing officer now makes and enters findings of fact and conclusions of law, and recommends a final order to the director, as follows.

### **Summary of Findings**

For reasons stated, I conclude that the methods followed by the Watermaster of Water District No. 1 should be sustained, and the relief requested by the complaining irrigation districts should be denied.

### **Findings of Fact**

1. These proceedings involve the irrigation seasons for the years 2001 through 2003. The issues presented pertain the proper accounting of water usage and water storage made by Ronald D. Carlson, the Watermaster of Water District No. 1, under certain contracts entered into for the exchange of storage water between the complaining irrigation districts and certain canal companies, whereby irrigation storage water was to be transferred from A&B Irrigation

District and Falls Irrigation District to certain canal companies in one year and returned the next.

2. As is relevant here, Water District No. 1 encompasses the most, if not all, of the Upper Snake River irrigation basin, including all the tributaries and reservoirs. The Watermaster of Water District No. 1 is responsible for administering all of the water resources available within the district. The parties and principals involved in the dispute before the hearing officer are all irrigation districts and canal companies within the district. All of these organizations are organized under, and duly operating under, the laws of the state of Idaho and all are in good standing and fully competent to conduct the businesses claimed.
3. The entities, rights and storage facilities involved in this dispute are cataloged for convenience here as follows:
  - a. American Falls Reservoir: This is a Bureau of Reclamation storage reservoir located on the Snake River with total capacity of approximately 1,672,590 acre feet. Both of the irrigation companies involved in this dispute are spaceholders of the American Falls Reservoir. According to the testimony, this reservoir usually fills every year, and would be considered – of the reservoirs involved in this dispute – the “easiest to fill.”
  - b. Palisades Dam and Reservoir: This is a Bureau of Reclamation storage reservoir located on the Upper Snake River with a total capacity of approximately 1,200,000 acre feet. This reservoir lies upstream from the American Falls Reservoir. A&B Irrigation District, Falls Irrigation District, Northside Canal Company and Aberdeen Springfield Canal Company are spaceholders of the Palisades Reservoir. According to the testimony and exhibits, there was no new natural fill into this reservoir during the

years in question. This reservoir could be considered “difficult to fill” -- certainly when compared with American Falls Reservoir.

- c. Jackson Lake Reservoir: This is a Bureau of Reclamation storage reservoir located on the Upper Snake River with a total capacity of 847,000 acre feet. This reservoir is upstream from both Palisades and American Falls reservoirs. The Twin Falls Canal Company, Northside Canal Company and Aberdeen Springfield Canal Company are spaceholders of this reservoir. A&B Irrigation District and Falls Irrigation District are not spaceholders at Jackson Lake Reservoir.
- d. A&B Irrigation District: A&B is an irrigation district duly formed under the laws of Idaho that delivers water to approximately 16,000 acres primarily from stored water in reclamation reservoirs. It is a spaceholder under a Bureau of Reclamation contract<sup>1</sup> of 90,800 acre feet in Palisades Reservoir and 46,826 acre feet in American Falls Reservoir.
- e. Falls Irrigation District: Falls is an irrigation district duly formed under the laws of Idaho that delivers water to approximately 8,500 acres primarily from stored water in reclamation reservoirs. It is a spaceholder under a Bureau of Reclamation contract<sup>2</sup> of 40,900 acre feet in Palisades Reservoir and 22,925 acre feet in American Falls Reservoir.
- f. Twin Falls Canal Company, Northside Canal Company and Aberdeen Springfield Canal Company: These are all non-profit corporations organized and operated to deliver irrigation water to users in Idaho. All hold storage rights for the delivery of

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<sup>1</sup> Bureau of Reclamation Contract, Exhibit 1.

<sup>2</sup> Bureau of Reclamation Contract, Exhibit 2.

water from resources within Water District No. 1, and all are spaceholders in some or all of American Falls Reservoir, Palisades Reservoir and Jackson Lake Reservoir.

4. The irrigation years 2001 and 2002 were generally considered to be drought years in certain of the areas affected by Water District No. 1, and particularly the areas served by the irrigation districts and canal companies that are involved in these proceedings. Findings of “drought emergency” were made by the county commissioners of the affected county or counties<sup>3</sup> for the years in question. The drought emergency declarations were intended to comply with the requirements of Idaho Code § 42-222A to authorize temporary exchange agreements.<sup>4</sup>
5. During the irrigation season 2001, the managers of Twin Falls Canal Company (Twin Falls), the Northside Canal Company (Northside) and the Aberdeen Springfield Canal Company (Aberdeen) became concerned whether their companies would be able to deliver all the water necessary for their members’ purposes to complete the irrigation season.
6. The managers inquired of A&B and Falls whether these districts had excess water they would be willing to provide to Twin Falls, Northside and Aberdeen to complete the 2001 irrigation seasons.
7. The managers of both A&B and Falls advised the canal companies that the irrigation districts had surplus storage water available for the end of the 2001 irrigation seasons. Based upon the emergency declarations and the provisions of I.C. § 42-222A, certain contracts were

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<sup>3</sup> According to the orders authorizing temporary exchanges, the affected counties were Bingham, Elmore, Gooding, Jerome, Power, and Twin Falls counties. See Hearing Exhibits 11 through 16.

<sup>4</sup> The statute, I.C. § 42-222A(1), requires that a drought emergency declaration is to be issued by the director of Department of Water Resources and approved by the governor. While it is not clear whether the director initiated or the governor approved the emergency declarations, this aspect of the mechanism of the statute was not raised by any party. From the testimony, it appears that the county commissioners initiated the emergency request, the governor approved the declaration and the director of IDWR then issued the approval orders thereunder. It is clear that the director of the Department of Water Resources did enter a series of orders authorizing the exchanges pursuant to the provisions of I.C. § 42-222A.

entered into between these irrigation districts and the canal companies for the “exchange” of water for the 2001 irrigation season.

8. In 2002, the manager of Aberdeen approached both A&B and Falls with a request to repeat the exchange transaction for the 2002 irrigation season. Certain contracts were entered into between A&B, Falls and Aberdeen pertaining to a transfer of irrigation water from the districts to the canal company in 2002 and a return of the water exchanged from the canal company to the districts in 2003.
9. One set of agreements pertained to the 2001 irrigation season, and another set of agreements pertained to the 2002 irrigation season. Except for the years in question, the identity of the parties and the specific quantities of water involved, all of these agreements are identical in the wording of all of the operative provisions.
10. A&B Irrigation District agreements for 2001 season consist of the following:
  - a. An agreement dated July 31, 2001 between A&B and Twin Falls Canal Company for the exchange of 24,000 acre feet of stored water. This agreement was received by the Department of Water Resources on or about August 14, 2001. An order authorizing temporary exchange of water was approved by the Department by order signed by Norman C. Young, Administrator, Water Management Division, on August 14, 2001.<sup>5</sup>
  - b. An agreement dated July 31, 2001 between A&B and the Northside Canal Company for the exchange of 19,200 acre feet of stored water. This Agreement was received by the Department of Water Resources on or about August 14, 2001. An order authorizing temporary exchange of water was approved by the Department by order signed by Norman C. Young, Administrator, Water Management Division, on August 14, 2001.<sup>6</sup>

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<sup>5</sup> Hearing Exhibit 11.

<sup>6</sup> Hearing Exhibit 12.

- c. An agreement dated July 31, 2001 between A&B and Aberdeen-Springfield Canal Company for the exchange of 7,000 acre feet of stored water. This Agreement was received by the Department of Water Resources on or about August 14, 2001. An order authorizing temporary exchange of water was approved by the Department by order signed by Norman C. Young, Administrator, Water Management Division, on August 14, 2001.<sup>7</sup>
11. The effect of these 2001 agreements was that A&B would transfer a total of 50,200 acre feet of its water to the three canal companies in 2001, in consideration for the payment of a stated sum of cash plus the commitment from the canal companies to return 50,200 acre feet of their water to A&B in 2002 if need be.
12. Falls Irrigation District agreement for 2001 consisted of an agreement dated July 31, 2001 between Falls Irrigation District and Aberdeen-Springfield Canal Company whereby Falls agreed to transfer 15,000 acre feet of water to Aberdeen in consideration for a stated sum of cash and the commitment of Aberdeen to return the water in the next year if need be. This agreement was received by the Department of Water Resources on or about August 14, 2001. An order authorizing temporary exchange of water was approved by the Department by order signed by Norman C. Young, Administrator, Water Management Division, on August 17, 2001.<sup>8</sup>
13. The agreements signed in 2002 consisted of the following:
- a. An agreement dated July 29, 2002, between Falls Irrigation District and Aberdeen-Springfield Canal Company for the exchange of 12,000 acre feet of water. This agreement was received by the Department of Water Resources on or about August 13,

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<sup>7</sup> Hearing Exhibit 13.

<sup>8</sup> Hearing Exhibit 14.

2002. An order authorizing temporary exchange of water was approved by the Department by order signed by Norman C. Young, Administrator, Water Management Division, on August 27, 2002.<sup>9</sup>

- b. An agreement dated August 19, 2002, between A&B Irrigation District and Aberdeen-Springfield Canal Company for the exchange of 13,000 acre feet of water. This agreement was received by the Department of Water Resources on or about August 23, 2002. An order authorizing temporary exchange of water was approved by the Department by order signed by Norman C. Young, Administrator, Water Management Division, on August 28, 2002.<sup>10</sup>

14. It was the intent of the parties, as clearly indicated by the operative language of all of the agreements that, with respect to the transfer of water by the irrigation companies – A&B and Falls – to the irrigation companies, the transfer of rights as defined by the agreements was to be complete and binding upon all parties upon execution of the agreements and approval by the Director of IDWR. The agreements of the irrigation companies to transfer water to the canal companies were not contingent or conditional agreements, with rights thereunder to arise at some future date, depending upon the occurrence of circumstances that had not yet occurred.

15. The agreements of the canal companies to transfer water back to the irrigation companies the next year was conditioned upon future events – that being an insufficient flow of natural water to fill the entirety of the available storage spaces of the irrigation companies under the defined contract with the Bureau of Reclamation, being the spaces controlled by the irrigation districts in American Falls and Palisades. According to the express terms of the

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<sup>9</sup> Hearing Exhibit 15.

<sup>10</sup> Hearing Exhibit 16.



agreements, as confirmed by the testimony of all the witnesses, if the drought ended and the reservoirs filled to capacity, there would be no obligation on the part of the canal companies to pay back the water received from the irrigation companies under the exchange agreements. The exact mechanics of how this condition would be applied is not relevant, as the drought continued during the next two years – 2002 and 2003 – and the reservoirs did not fill sufficiently to trigger any reduction in the repayment obligations of the canal companies as set forth in the agreements.

16. The Watermaster treated the transfers in and out under the exchange agreements to be sets of two separate and independent transactions. The transactions out during the first year were considered and booked as complete transactions within the WRA accounting program, and closed out as such by the Snake.stor program, for the first year in question. The returns of water the next year by the canal companies to the irrigation districts were treated as separate and complete transactions within the WRA accounting programs, and closed out as such by the Snake.stor program, for the second year, in each case.
17. According to the records of the watermaster, the canal companies were credited with receiving and the irrigation districts were charged with delivering all of the water transferred out by the irrigation districts during the 2001 and 2002 irrigation seasons. According to the records of the watermaster, the irrigation districts were credited with receiving and the canal companies were charged with delivering all of the water transferred back to the irrigation districts during the 2002 and 2003 irrigation seasons.
18. Ronald D. Carlson is the Watermaster of Water District No. 1 and is the official responsible for administering the water rights of all water users in the district. As is relevant to these

proceedings, the Watermaster was responsible for administering the exchange agreements in accordance with the orders entered by the Department of Water Resources.

19. In accomplishing these responsibilities, the Watermaster relied, in part, upon two computer programs developed by the Department of Water Resources – “WRA,” or “Water Rights Accounting” and “Snake.stor.”
20. “WRA” is the management computer program to track of the status of all water located throughout the Upper Snake River Basin during the irrigation season. This program is run on a daily or frequent basis throughout the irrigation season, and accounts for the inflows and outflows of both stored water and natural flow throughout the system. At the end of the irrigation season, this program determines the total carryover of stored waters remaining for allocation to the next year. The total calculations on stored water from the WRA program are fed into the “Snake.stor” program at the close of the irrigation season.
21. “Snake.Stor” is a computer program that makes all of the necessary calculations to allocate the carryovers determined by the WRA program to the various reservoirs and spaceholders. This program correlates the spaceholder allocations available in all of the reservoirs, the actual water present in each of the storage reservoirs according to physical measurements and telemetry devices, the evaporation component (and other loss factors to be accounted for) experienced and expected, and the total carryovers to account for as determined from the WRA accounting program resulting and accrued to the credit of each of the users throughout the system. The “Snake.stor” program closes the books at the end of the irrigation season, reconciling transactions for all of the users through the WRA program for the entire season with the physical reality of the actual storage water remaining in all the reservoirs in the system.

22. These two computer programs were written in the later 1970s by Bob Sutter, then an employee of the Department of Water Resources. The programs are written in FORTRAN and are run on the main IDWR computers in Boise. Initially, the state agency ran these programs, but over the years, the responsibility for running the programs was transferred to the office of Water District No. 1. (The programs are custom designed for the Upper Snake River Basin, and have no application to any other geographical area other than the regions served by Water District No. 1.) The state agency still provides the hardware and retains responsibility for maintaining the software. For some years, the software was maintained by Bob Sutter, the author of the programs. The software is now maintained by Pam Pace, a technical hydrologist with the state agency, with assistance from Bob Sutter, who is now retired but under contract as a consultant to the Department. Both testified at the hearing.
23. The day-to-day running of the programs is now the responsibility of the office of the Watermaster of Water District No. 1. During the times relevant, these operations were accomplished by or under the direction of Tony Olenichak, a hydrologist and the assistant watermaster of Water District No. 1. In the case of the data relevant to this case, Olenichak entered or supervised the entry of the data into the computer system for the WRA programs to record the agreements for water transfers contained in the exchange agreements detailed above.
24. In accounting for water usage in the WRA program, certain protocols or "rules" are followed. These protocols are incorporated into the coding of the computer program, and could not be changed without recoding or rewriting the computer program. There are two protocols that appear to me to be material to this case:

- a. In accounting for water usage during a given year, it is assumed that storage water will be drawn first from reservoir space that is considered “easiest to fill” – which in this case would be American Falls. Subsequent draws are to be accounted for upstream, in the order of the easiest to fill.
  - b. It is assumed that water will be held in storage the longest in that space considered the most difficult to fill.
  - c. In the case of water being transferred from one user to another – whether from natural sources or from existing storage of the transferring party – it is assumed that this water will be used first by the transferee.
  - d. In accounting for fills into storage reservoirs, the computer programs observe the “prior appropriation doctrine.” The spaces with the oldest rights are filled first; the spaces with the newest rights are filled last. Generally, this will mean that American Falls, whose spaceholder hold the earlier rights, will be filled to capacity first, and Palisades, whose spaceholders hold later rights, will be filled later.
25. According to the Watermaster’s weekly report, by August 14, 2001, A&B had used 46,932 acre feet of water for the current irrigation season, and had available in storage 74,986 acre feet.<sup>11</sup> Since A&B was entitled to receive 46,826 acre feet in American Falls and 90,800 acre feet in Palisades,<sup>12</sup> and since it is deemed to use water from American Falls first, A&B usage for the season would have exhausted the American Falls allocation completely, plus 100 acre feet or so of the allocation available at Palisades. According to this report, virtually the entire balance of water in storage as of August 14, 2001 would have been held in Palisades.

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<sup>11</sup> The Watermaster’s weekly report for August 14, 2001 – Hearing Exhibit 17.

<sup>12</sup> Schedule of Spaceholders for Minidoka and Palisades Projects – Hearing exhibit 51

26. According to the Watermaster's weekly report, by August 14, 2001, Falls Irrigation had used 20,002 acre feet of water for the current irrigation season, and had available in storage 29,390 acre feet.<sup>13</sup> Since Falls was entitled to receive 22,925 acre feet in American Falls and 63,825 acre feet in Palisades,<sup>14</sup> and since it is deemed to use American Falls water first, all but some 2,900 acre feet of water storage as of August 14, 2001 would have been held in Palisades.
27. The managers and board members who testified from A&B and from Falls all expected and intended that most, if not all, of any water transferred to the canal companies under the exchange agreements would come from the respective irrigation districts' storage allocations in Palisades.
28. The managers of the canal companies all testified that they understood the water they would be receiving would come from the irrigation districts' allocations in Palisades, and that the irrigation districts expected the payback water to be returned to the storage allocations in Palisades.
29. The data from the exchange agreements as approved by the Director of the Department were manually inputted into the WRA computer system in the late summer – August or September – of 2001 by Tony Olenichak. This input did not designate where the water was to come from, or where it was to go. The input into the WRA accounting program simply accounted for the total of the water transferred “out” – from the irrigation districts – and “in” – to the canal companies – in the Upper Snake River Basis system. The specifics of where the water was to come from, and where it would be ultimately stored, if any was left over, was left for the calculations to be made later, when the Snake.stor program was run at the end of the season.

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<sup>13</sup> Watermaster's weekly report for August 14, 2001 – Hearing Exhibit 17.

<sup>14</sup> Schedule of Spaceholders for Minidoka and Palisades Projects – Hearing Exhibit 51.

30. The effect of this input was to immediately “move” the water from the irrigation districts to the canal companies on the books of Water District No. 1.
31. During the irrigation season, the WRA computer program does not pay any attention to the specific location of any specific user’s water at any specific time. The computer program – WRA – keeps track of all the water in the system, the ongoing demands against that water from all of the users at any given time, and the total of the demands against all of the water over time, wherever located. The WRA program is satisfied as long as the total supply and total demand against the total water in the total system is in balance. No attempt is made to correlate the specific amount of water demanded, supplied or held to specific storage locations and/or to specific users at any specific time during the irrigation season. As I understand, during the irrigation season, the entire Upper Snake River Basin is considered as a single, huge water tank with multiple sources of supply and multiple faucets and spigots for demand. The WRA program keeps close track of the total capacity of this tank, of all water flowing in and out during the season, and the totals applied to every user in the system, but without particular day to day concern for the specifics of whose space in what storage location by which claim or demand is being affected by the daily operations. These specific calculations are held until the end of the season, when the computer program “Snake.stor” is run to account for and allocate the storage water carryovers – both plus and minus – which remain to the specific users and in the specific storage locations.
32. As a result, and conceptually, as soon as the water transfer agreements between the irrigation districts and the canal companies were entered into the computer system at Water District No. 1, the 50,200 acre feet transferred out of A&B Irrigation and the 15,000 acre feet transferred out of Falls Irrigation were “gone” from the storage spaces – wherever located –

held by the two irrigation districts. This water now “belonged” to the respective canal companies in accordance with the amounts indicated in the transfer documents.

33. In the case of Twin Falls Canal Company, for example, this company does not hold any reservoir space in Palisades. So any water transferred to it by A&B out of Palisades Reservoir would be deemed held in the system somewhere, without any specific allocation to a storage location, even though it could not have been held at Palisades by the canal company. The WRA program “subtracted” this water from the account of A&B and “added” it to the account of Twin Falls Canal Company, but made no assignments from either as to the specific storage locations involved. The WRA program makes the transfer without regard to the physical location of the water and without regard to whether any physical transfer of water had or had not taken place.
34. The same situation existed with respect to all of the transfers from the irrigation districts to the canal companies under the exchange agreements approved in 2001.
35. The parties argue that with respect to A&B’s agreements with Twin Falls and Northside, none of the water transferred by the exchange agreements was drawn out by the canal companies. These canal companies completed their respective irrigation seasons without having to physically call upon any of the water provided by A&B Irrigation District under the exchange agreements approved by the Director of the Department of Water Resources and submitted to the Watermaster.
36. According to the Watermaster’s reports, Twin Falls ended the irrigation season with a carryover of 26,917.3 acre feet (which included the transfer in of 24,000 acre feet from

A&B), and Northside had a carryover of 42,240.5 acre feet (which included the transfer in of 19,200 acre feet from A&B).<sup>15</sup>

37. However, the Watermaster was not advised of this by either anyone from the canal companies or by anyone at the irrigation districts. (It is not clear whether anyone at the irrigation districts knew that the canal companies had not made any draws against the water covered by the exchange agreements.)
38. As a result, the WRA program closed the year with the transfer in place and relayed the data pertaining to the transfers to the “Snake.stor” program. The entirety of the transfers to the canal companies would have been included in the carryover calculated by the WRA program when it “closed the books” for the year, and this carryover would have been transferred into the “Snake.stor” program for allocation to the specific reservoirs in the system.
39. The “Snake.stor” program calculates the storage water carryovers allocated to each user, and calculated the location of the waters, in accordance with protocols established when the program was written in the 1970s.
40. As a result, at the end of the 2001 irrigation season, the allocated storage carryover assigned to A&B Irrigation was reduced to 9,901.6 acre feet, and the allocated storage carryover assigned to Falls Irrigation was reduced to 8,914.3 acre feet, presumably all at Palisades. To reach these totals, the watermaster’s report for the year included as footnotes an adjustment of 50,200 acre feet from the storage allocation of A&B and 15,000 acre feet from the storage allocation of Falls Irrigation to account for the storage transfer agreements with the canal companies.<sup>16</sup> The calculations for these districts at the end of 2001, as reported in the Watermaster’s report are as follows:

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<sup>15</sup> 2002 Watermaster’s Report, Table 21– Hearing Exhibit 52.

<sup>16</sup> Draft Table 21 and endnotes from the 2001 Watermaster’s Report – Hearing Exhibit 52.



<b>Description</b>	<b>A&amp;B Irrigation</b>	<b>Falls Irrigation</b>
Storage allocated	122,028.0 a/f	49,436.1 a/f
Storage used	61,926.4 a/f	25,521.8 a/f
Transfers to canal cos.	50,200.0 a/f	15,000.0 a/f
Carryover	9,901.6 a/f	8,914.3 a/f

41. The arithmetic in the accounting for the transactions in 2001 has not been challenged by the irrigation districts. There are some slight differences between the figures claimed by the parties resulting from rounding decisions, evaporation estimates, or from inclusion of other minor loss adjustments because of demands of the system. The irrigation districts acknowledge the necessity for these minor adjustments, and generally accept the arithmetic calculations of the Watermaster.
42. The result of these calculations by the Watermaster is that the storage allocations of A&B at Palisades was reduced in 2001 by a combination of usage, evaporation, minor adjustments and transfers to 9,901.6 acre feet at the beginning of 2002, and the storage allocation of Falls at Palisades was reduced in 2001 by a combination of usage, evaporation, minor adjustments and transfers to 8,914.3 acre feet.
43. Although it is a mixed finding of fact and conclusion of law, I do find as a fact that the exchange transactions evidenced by the exchange agreements, as presented to the Director and authorized by order of the Department, and as accepted and administered by the Watermaster, were intended to be final, complete and binding upon all parties in the irrigation season 2001.
44. Therefore, I find as a fact that the Watermaster's accounting entries deducting the subject water from the allocations of A&B Irrigation and Falls Irrigation, and adding this water to the allocations of the canal companies for the operating irrigation season 2001 was correctly done, and the balances at the end of the irrigation season were and are correctly stated.

45. In the irrigation season 2002, the paybacks from the canal companies to the irrigation districts for the exchange water transferred under the agreements were manually entered into the WRA computer system, and appear on the watermaster's annual report as adjusting entries explained in the footnotes. The paybacks were treated as the first water diverted out of the canal companies' allocations for the irrigation season 2002, and therefore the first water flowing into the irrigation districts' irrigation system to its users. Again, the adjusting entries account only for the total water withdrawn from the canal companies' allocations for the 2002 irrigation season and delivered to the irrigation companies. These manual adjusting entries do not specify where the water is coming from or where or how it is to be applied by the receiving irrigation districts. These specifics are computed later, when the Snake.stor program is run at the end of the season to calculate and account for carryovers, in accordance with the protocols set forth above.

46. The Watermaster's accounting for the paybacks for A&B Irrigation is explained in a memorandum from Tony Olenichak to Dan Temple, manager of A&B Irrigation District.<sup>17</sup> According to Olenichak's figures (reorganized somewhat by me to illustrate the accounting) the 2002 water allocation for A&B was accounted for as follows:

Resources:	
Carryover from 2001 <sup>18</sup>	9,703
Canal Company paybacks for 2001	50,200
New water at American Falls	45,802
New water at Palisades	<u>0</u>
Total available	<u>105,705</u>
Outflows:	
To A&B District usage	58,501
To minor uses <sup>19</sup>	4,012
To Aberdeen Springfield for 2002	<u>13,000</u>

<sup>17</sup> Olenichak to Temple fax memorandum dated June 12, 2003 -- Hearing Exhibit 33.

<sup>18</sup> This total is apparently the carryover from the watermaster's report of 9,901 less estimated evaporation.

<sup>19</sup> Boy Scout pump for 2002, 15 acre feet; Milner Dam spillage adjustment, 997 acre feet; and groundwater district rentals, 3,000 acre feet -- per Olenichak's memorandum.

Total outflows	<u>75,513</u>
Carryover to 2003	30,192

47. The carryover in Olenichak's memorandum is stated as 30,191 acre feet instead of 30,192, obviously due to a rounding decision. The difference is inconsequential.

48. The Watermaster's accounting for the paybacks for Falls Irrigation is explained in a memorandum from Tony Olenichak to Terrell Sorensen, manager of A&B Irrigation District.<sup>20</sup> According to Olenichak's figures (reorganized somewhat by me to illustrate the accounting) the 2002 water allocation for A&B was accounted for as follows:

Resources:	
Carry over from 2001 <sup>21</sup>	8,736
Canal Company Payback for 2001	15,000
New water at American Falls	22,423
New water at Palisades	<u>0</u>
Total Available	<u>46,159</u>
Outflows:	
To Falls Irrigation usage	24,939
Other uses <sup>22</sup>	4,167
To Aberdeen Springfield for 2002	<u>12,000</u>
Total Outflows	<u>41,106</u>
Carryover to 2003	5,053

49. While the transactions for the exchanges were manually entered into the WRA system by Tony Olenichak, the allocation of the carryovers to the storage locations within the water district was handled at the end of the irrigation season by the computer program "Snake.stor." This program handles the allocation in accordance with certain protocols imbedded within the program when it was designed

<sup>20</sup> Olenichak to Sorensen memorandum dated June 19, 2003 – Hearing Exhibit 34.

<sup>21</sup> This total is apparently the carryover from the watermaster's report of 8,914.3 less estimated evaporation.

<sup>22</sup> Groundwater district rentals, 4,000 acre feet; Milner spillage adjustment, 167 acre feet – per Olenichak's memo.

50. A protocol imbedded within the “Snake.stor” program, according to Bob Sutter, is based on the “Prior Appropriation Doctrine,” which requires that in accounting for the filling of reservoir space, the space with the older rights must be filled first.
51. With respect to Falls Irrigation, the district usage for the irrigation season and other uses would have exhausted the American Falls storage allotment for the year and would have further depleted the storage in Palisades. Olenichak observed that the net usage for the 2002 irrigation season, after offsetting the canal company transactions, was 26,106 acre feet; which exceed American Falls Reservoir allotment of 22,423 acre feet (after adjustment for evaporation) by 3,683 acre feet. This excess would have to be subtracted from the storage at Palisades. This would leave Falls Irrigation with a carryover to the 2003 season of 5,053 acre feet, all in Palisades. This is equal to the 2001 adjusted carryover of 8,736 minus 3,683 acre feet – the excess in net usage for the season.
52. With respect to A&B Irrigation, if the first water into the A&B Irrigation system for 2002 came from the canal company’s payback, and if this water was the first to be used in 2002, then the remainder of the district’s total usage for the irrigation season would not have exhausted the season’s 2001 American Falls reservoir allotment, and therefore would not have touched the storage in Palisades. This resulted in Olenichak’s observation that the carryover after the 2002 season would have been 20,488 acre feet in the American Falls reservoir (45,802 acre feet allocation minus the net storage usage for 2002 of 25,313 acre feet), and the entirety of the Palisades 2001 carryover of 9,703 acre feet, which was not touched during the 2002 irrigation season, for a total carryover of 30,191 acre feet.
53. As relevant here, the total carryovers from the 2002 irrigation season are reflected in Table 21 of the Watermaster’s Annual Report for 2002, together with the endnotes thereto.

(Hearing Exhibit 52). While this table shows the total carryover allocated to each user, it does not reflect how the totals for the users in question are allocated between the specific reservoirs. The managers of the irrigation districts advised that they were not aware of how the carryovers were being allocated when the 2003 irrigation season began.

54. The allocation had no particular impact on Falls Irrigation District for the 2003 season, because it had again transferred water under an exchange agreement – which had the effect of “rolling ahead” one year any issue pertaining to the assignment of any payback – and because the entirety of the American Falls allocation was exhausted in 2002 anyway. It did impact A&B. The allocation assigned to A&B following the 2002 irrigation season meant that A&B started the 2003 season with a carryover in American Falls reservoir of 20,488, while the carryover in Palisades was only 9,405, after corrections to reflect the minor adjustments and estimated evaporation. No new natural fill occurred in Palisades in 2003. American Falls did fill, as expected, but according to the Watermaster’s accounts, A&B could only accept an additional 25,336 acre feet in American Falls to reach its maximum allotment of 46,826 acre feet. This meant that A&B’s total water allotment in storage for the 2003 irrigation season was only 56,509 acre feet, which Olenichak estimated would be reduced to 54,793 in actual water available for use after adjustment for evaporation – 45,388 acre feet in American Falls and 9,405 acre feet in Palisades.

55. All of the witnesses from A&B Irrigation testified that they thought the payback water would go back to the storage location from where it originated, or back to Palisades. They contend that if the water was returned to the storage where it presumably originated, the 50,200 acre feet of water would have been returned to Palisades on the books of the Watermaster, and if American Falls filled as expected, it would have another 46,826 acre feet there. A&B

contends that the 2002 season should have provided it with a total allocation of approximately 106,727 acre feet – being 59,901 acre feet in Palisades (the 9,901 carryover plus 50,200 acre feet in payback water from the canal companies) and a full 46,826 acre feet in American Falls. (These calculations do not take into account evaporation or other system losses, which the districts acknowledge would have to be included.)

56. Alternatively, A&B contends that since Twin Falls and Northside did not actually withdraw any of the water covered by the exchange agreements, the water covered by these agreements remained in Palisades. Correct accounting, they argue, would be to merely reverse the transactions to restore at least this water – 43,200 acre feet -- covered by the Twin Falls and Northside exchange agreements -- to A&B's allocation in Palisades Reservoir on the books of the Watermaster. This would also allow A&B to accept the entirety of the annual American Falls reservoir allotment of 46,826 acre feet.

57. A&B witnesses and A&B's counsel point to rules adopted by the Committee of Nine for operation of rental pools, and particularly Rule 7.6 thereof. This rule provides, in its relevant part, "Water rented from the rental pool and not delivered by the end of the irrigation season ... shall be returned to the lessor ... as carryover storage...." There was testimony that this provision of the rule could be interpreted to mean that if water offered to the rental pool was not delivered, it would be returned to the offering party to be placed in the storage that was the hardest to fill. (Bob Sutter so testified), although the Watermaster testified that he disagreed with the specifics of this interpretation.

58. The Watermaster acknowledged in general the existence of the rental pool rules as promulgated by the Committee of Nine, and acknowledged that he had indicated that he would use the procedures in accounting for the exchanges. He maintained that the rules were

guidelines, however, and not the equivalent of regulations or administrative rules of the Department of Water Resources or of the Office of the Watermaster.

59. The provisions of the rental pool rules do not help in this situation, because the water under the exchange agreements did not remain “undelivered” at the end of the season. As noted above, I find as a fact that the water covered by the exchange agreements was effectively delivered by the irrigation districts to the canal companies. There was no “undelivered” water remaining in the system to account for when the WRA program was closed and the data transferred to the Snake.stor program for the end-of-year calculations and allocations.
60. In any event, no one notified the Watermaster’s office that the water was not being withdrawn during the irrigation season. The testimony was that officials of both the irrigation districts and the canal companies let the watermaster’s accounting programs take care of the transfers out in one year, the transfers back the next year, and the allocations to the reservoirs that were required. The testimony was that had Olenichak been notified before the end of the irrigation season that the water was not being withdrawn, the entries might have been reversed without a problem, but once the season ended and the end-of-season programs were run to calculate and allocate the carryovers to the specific users and into the specific storage locations, it was too late to go back and try to undo the transfers.
61. The Snake.stor program allocates water throughout the system, adjusting for evaporation and other factors, and assigning storage throughout all of the reservoirs among all of the users in the system. It is not designed to go backwards. The testimony was that the program code of the Snake.stor program would have to be modified or rewritten to accomplish what the irrigation districts wanted done in this case.

62. It would not be feasible to undo or adjust the allocations for one user by hand and do all of the computations and adjustments to reallocate the storage units to all of the users and all of the reservoirs, once the allocations had been run through the Snake.stor program and distributed to all of the users and to all of the reservoirs throughout the system.
63. In any event, the exchange agreements did not contemplate a situation where the water would not actually be delivered so that the transfer could merely be reversed on the books of the Watermaster. The requirement for repayment as stated in the contracts had a condition that excused repayment if the reservoirs filled from natural resources. For example, section 1(b) of the contract between A&B Irrigation and Twin Falls Canal Company pertaining to the transfer of 24,000 acre feet of water in 2001 requires that the first 24,000 acre feet of stored water accruing to the canal company in 2002 is to be transferred to A&B,

“or so much thereof as may be necessary to ensure that the amount of stored water available to A&B for use in the 2002 irrigation season is equal to storage water that is available to A&B when all of its space allocated to it under its spaceholder contract with the Bureau of Reclamation has filled.”<sup>23</sup>

All of the contracts with all of the canal companies have identical provisions.<sup>24</sup> The operative effect of these conditions on repayment is that the repayment obligation could not be determined until midway through the next season, after the Watermaster ascertains what the fill levels of all the reservoirs in the system was going to be, and particularly, to what extent the reservoirs were going to fill from natural sources. If the drought ends and all of the allocated spaces of A&B and Falls Irrigation fill, there would be no obligation for any repayment under the exchange agreements. If the natural flow filled most of the allocated space, but not all, then the repayment obligation would be reduced to that necessary to

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<sup>23</sup> The contract is included with the documents at Hearing Exhibit 11.

<sup>24</sup> Exhibits 11 through 16



completely fill up the allocated space. If the natural fill is not sufficient, and more than the amounts of the transfers remain unfilled, then the repayment clauses operate to work a transfer of all of the water transferred under the agreement.

64. The clauses all provide that the paybacks, when they occur, are to be charged against the first water available, whereas the determination of fill level on the reservoirs is not made until late June or early July, when the run-off is complete.

65. I conclude as a fact that by the middle of the next irrigation season, it would not be feasible under any of the agreements to undo or reverse the transfers, even if it was discovered that the water to be transferred was not physically withdrawn from the Palisades Reservoir in 2001.

66. Essentially the same situation, but to a lesser degree, was created during the next irrigation season. In August of 2002, Falls Irrigation agreed to transfer 12,000 acre feet<sup>25</sup> and A&B Irrigation agreed to transfer 13,000 acre feet<sup>26</sup> to Aberdeen Springfield, under exchange agreements that required Aberdeen Springfield to repay the water in 2003, subject to the same conditions as contained in the 2001 agreements.

67. The Watermaster's calculations for the carryover into the 2004 season are set forth in Table 21 to the Watermaster's 2003 Annual Report and the endnotes thereto. (Exhibit 53. In this table, the carryovers to A&B and Falls Irrigation are reported to be as follows:

User/Spaceholder	A&B	Falls
Storage allocated	54,881.3 a/f	27,159.4 a/f
Rental or Purchases	17.1 a/f	2,982.9 a/f
Storage Used	58,497.1 a/f	25,316.5 a/f
Adjustments*	12,000.0 a/f	13,000.0 a/f
Carryover	10,680.0 a/f	9,401.3 a/f

\* Adjustments, per endnotes, were the paybacks from Aberdeen

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<sup>25</sup> Exhibit 15.

<sup>26</sup> Exhibit 16.

68. In this table, the beginning figure of storage allocated for A&B in 2003 consisted of the carryover from 2002 of 30,192 acre feet – being 9,701 in Palisades and 20,491 acre feet in American Falls – plus an additional 25,735 acre feet to fill American Falls to A&B's maximum allotment, adjusted by estimated evaporation. The beginning figure for Falls storage allocated in 2003 consisted of its carryover from 2002 of 5,053 acre feet plus 22,423 acre feet to fill American Falls, adjusted by estimated evaporation.
69. Witnesses from A&B testified that this report, and the table in it, was the “red flag” that brought the carryover calculation problem to their attention.
70. The irrigation companies protested the Watermaster's accounting to the Director of Water Resources. On August 6, 2004, the Director entered his final order on the matter, containing his findings of fact, analysis and order. The Director concluded that the Watermaster was correct in his accounting for the waters transferred, returned, used and carried over with respect to both irrigation districts and with respect to the years in question.<sup>27</sup>

### **Analysis**

The central issue to this dispute is the manner in which the “payback” water is treated. The fundamental issue appears to be whether the Watermaster is correct in classifying the payback water as “first water used,” and accounting for the district's total usage accordingly, or whether the districts are correct in claiming that the payback water should have been considered as “returned to storage,” and particularly, returned to the higher elevation or “difficult to fill” storage at Palisades.

The Watermaster treated the return water as the first water used in the irrigation districts' systems. The irrigation districts claim the payback water should be considered as storage water,

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<sup>27</sup> The Director's August 6, 2004 Order is part of the official file on this matter maintained by the Department of Water Resources. It is also contained in the exhibit book as Hearing Exhibit 46

and returned to the specific storage from where it was – or would have been – drawn. Mitigation, Inc., the intervenor, advises that it merely wants to ensure that any method of accounting does not in any measurable fashion infringe or impair the rights of any other user in the system. Their announced concern is that the mechanism of exchange and payback not be treated in any manner to allow a user to “leapfrog” a junior priority into a more preferred position when compared with other users.

The Irrigation Districts contend that the Watermaster is bound by the terms of their contract, and that the intent of the contract was to return the exchange water to the specific location from where it was drawn. All of their witnesses so testified. There are several problems with this argument.

First, the Watermaster is not bound by the terms of the contracts between the parties as a matter of law. The Watermaster is not a party to these agreements, and is not contractually obligated to either party under any of them. Although the agreements were approved by the Department of Water Resources, the approval order does not incorporate the contracts into it, nor does it otherwise elevate the agreements themselves into the status of an order or directive of the IDWR. The approval orders of the Department specifically condition the operation of the exchange agreement upon a number of requirements. A clear indication of the requirements contained in the IDWR order of approval is that nothing occur that could impair or injure rights of others, or that could enlarge or change the character of the water rights held by either party of the exchange agreement. Further, it is clear from the orders that the Watermaster is to retain the responsibility to administer the mechanism of the exchange.

Secondly, the exchange agreements themselves are silent on the issue of where the water is to come from and where it is to go upon repayment. This aspect of the mechanism is not

addressed in the agreements themselves, nor in the applications filed with the IDWR, nor in the orders of approval. None of the agreements specify where the water is coming from in terms of specific storage reservoirs and none specify where the water is to go when it is returned. All of the agreements refer generically to the Bureau of Reclamation contracts, or refer generally to both American Falls and Palisades Reservoirs, without making any distinction between the two.

Finally, the exchange agreements do contain specific language that the water to be transferred back to the irrigation districts the following year is to be “the first water used” in that year. The full clause in the first agreement executed between A&B Irrigation and Twin Falls Canal Company in 2001<sup>28</sup>, for example, which is paragraph 2(e) of the agreement, reads as follows:

This agreement relates to actual water stored, and no reservoir loss shall be charged to A&B for the storage water to be transferred to A&B from Company [Twin Falls Canal Company] for use by A&B in the 2002 irrigation season, which storage water shall be the first storage water used by A&B in 2002.

All of the agreements contain identical clauses.<sup>29</sup>

Witnesses for the irrigation district all testified that what they intended by the phrase, “first water used,” was that the return water could be “used” in any appropriate manner by the irrigation districts, and in this case, they intended that the returned water be “used” for storage, and returned to the reservoir from where it originated. The irrigation districts argue that the Watermaster is obligated to construe the exchange agreements in accordance with the intention of the parties. I do not accept this contention.

While it is true that in contract law the intention of the parties is to control, that intention must be measured by the language of the contract and not by after-the-fact explanations of terms.

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<sup>28</sup> Hearing Exhibit 11

<sup>29</sup> Hearing Exhibits 12 through 16.

Parole evidence is admissible to explain the terms of written agreements only where terms are ambiguous. Where, however, the terms are not ambiguous, the terms should be given their plain, ordinary meaning placed in context with the remaining provisions of the agreement.

In this case, I am satisfied that the phrase “first water used” means what it says – the term “used” means that the water is deemed to have been delivered to members and applied by them for irrigation purposes – i.e., “used” in the ordinary connotation of the word. This is the connotation that would have been placed upon the terms when the agreements were presented to the Director for approval, and that would be expected of the Watermaster when administering the agreements with respect to the resources of the system and the rights of other users. The words “used” and “stored” appear throughout readings on irrigation usage and law, and there cannot be confusion between the two. I conclude that the term “used” cannot be construed to mean “stored” under any reasonable construction.

Witnesses testified, and the Director so found in his findings of fact, that water is stored in the various reservoirs throughout the water district according to the priority of storage water rights. The Director further observed that in order to accrue new storage credits in a particular reservoir, there must be new water available for storage in that reservoir under the priority of the storage right for that reservoir, and the water must be physically available in the system. (Finding 7 of the Director’s Order of August 6, 2004.)

The irrigation districts contended, and the Watermaster did not disagree, that it was the practice of District No. 1 to hold storage waters in reservoirs that are “hardest to fill” – to maximize storage capacity. This is consistent with the Director’s finding that the practice was to hold water in the upstream reservoirs, since these are considered the hardest to fill. (Finding 8 of the Director’s Order of August 6, 2004.)

The irrigation districts construe this practice to mean that when water is returned to storage, it will be returned first to storage that is the most difficult to fill. This might be the case where possible, but it does not apply in the circumstance presented in this case. The concept missing from this contention is the obvious one – there must physically be new water into the reservoir or reservoirs to make up the additional fill. In this case, the evidence was that there had been no new water into the Palisades Reservoir since 2000. This meant that there was no resource in the upstream reservoirs that could provide water available to the canal companies that could be allocated to the irrigation companies in satisfaction of the payback arrangements contained in the exchange agreements.

The irrigation districts contend that it is IDWR and Water District policy to account for water usage first out of reservoirs that are the easiest to fill – i.e., reservoirs such as American Falls – and to assign carryover waters in first to reservoirs in to the hardest to fill – i.e., reservoirs such as Palisades. The Watermaster appears to disagree with this contention. In much of the correspondence between the watermaster and counsel for the irrigation districts, the two were talking past one another on this point. Their exchange of letters does not appear to address squarely the core issue. However, on the question of accounting for carryovers, the Watermaster did make clear the water district approach. In a letter to the irrigation district's counsel, the Watermaster advised,

For a number of reasons, we never artificially change the allocation in any reservoir....We believe that artificially moving water from one reservoir water right to another after the initial carryover has been computed is tantamount to delivering water rights out of priority without legal authority to do so.<sup>30</sup>

When the issue was presented to the Director, the Director agreed with the Watermaster. In the Director's order, the Director acknowledged that it was the practice of the water districts

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<sup>30</sup> Carlson to Ling letter of June 26, 2003 – hearing exhibit 38

to physically hold as much storage water as possible in the upstream reservoirs, but he noted that this did not have any application to the assignment of carryovers from year to year. In fact, the Director observed that to follow the practice advocated by the districts in this case would work a situation where senior priority water could be diverted into a junior priority space.

This is a difficult concept to grasp, and I readily acknowledge that it has taken me considerable time to work through the process. As a starting point, it must be understood that there is no problem at all if a drought condition does not persist. Under all of the agreements entered into in this case, it is provided that if all the reservoirs fill to capacity there will no obligation on any of the canal companies to repay any of the water “borrowed” under the exchange agreements. In such event, all users will have received their full component of stored water. A second point to understand is that the Palisades allocations of all the users – both the irrigation districts and all the canal companies – is junior in priority to the rights of these users in the downstream reservoir at American Falls. The Palisades rights of all the users date from 1939, while the American Falls rights date from 1921. The Watermaster argues that difference in priority dates is significant. He argues that if a drought does continue, and if one reservoir fills but the other does not, then if the Watermaster were to allow a user to direct that the return of water “borrowed” during the previous year be allocated to the Palisades storage in the year of repayment, this could work a situation where senior priority water is diverted into junior priority storage.

Here is how I understand it: the water coming out of storage during the first year would first come out of the reservoir easiest to fill – American Falls – which has the senior priority rights. This in accordance with the protocols established that storage water is held in the

upstream storage as long as possible, meaning it would be drawn first from the downstream reservoir at American Falls, which everyone acknowledges is considered “easiest to fill.”

Water would be held in the upstream reservoirs as long as possible, and would not be withdrawn until the downstream reservoirs were drained. In this case, by the time the exchange agreements were recorded on the books of the Watermaster, the irrigation districts’ usage of water for its own members had exceeded the storage allocation at American Falls. This meant that any water transferred to the canal companies would have to come out of the upstream storage at Palisades. However, from the Watermaster’s accounting in WRA compute program, none of this was material during the actual irrigation season. All the WRA program was tracking was the total water in the system to A&B’s credit – both in American Falls and Palisades – and the total demands against this quantity. According to the WRA accounting system, there would be no way of determining what water was going to the members of the irrigation district and what water was earmarked for delivery to the canal company under the exchange agreements. During the season, this specific is not necessary to keep the system in balance.

When the seasons ended, and the WRA program closed into Snake.stor, it is clear from the simple arithmetic that anything left over after the first year would remain in the upstream reservoir. Water is deemed withdrawn first from the reservoirs easiest to fill – American Falls – and held longest in the reservoir hardest to fill – Palisades. This is not an artificial allocation but reflects, in fact, the manner and order that water is used from the system, and does in fact reflect the water remaining in the reservoirs at the end of the season.

This means that the end of year calculations by the Snake.stor program are intended to reflect fairly closely the actual, physical condition of the reservoirs and to allocate the water



existing among the spaceholders in recognition of the actual condition of the reservoirs in light of the rights of all the spaceholders.

I agree with the Watermaster's contention that, for the orderly operation of the district as a whole, it is essential that the storage calculations be made according to a standard protocol, and that the calculation not be subject to manipulation by the actions of a single user. The Watermaster must have control over the flow of water and allocation of carryovers, and must make the decisions on assignments of flow and allocations of carryovers in a consistent, even-handed and predictable fashion among all users, and in every year. If the allocation of carryovers could be manipulated in any significant fashion by individual users, I think it inevitable that chaos would soon reign.

As testified by the Watermaster, and as appears in the correspondence in evidence, an essential first step in the necessary protocols for allocation of carryovers where there have been exchanges or transfers of water between users is that the water interest being transferred from another user – rather than from natural flows or from existing storage – is to be treated on the books of the Watermaster, the WRA accounting program, as water “used” by the transferee during that irrigation season and not stored. This protocol eliminates any problem of shifting or reallocating waters to different priorities, or of such allocations or reallocations infringing upon the rights of any other water user.

I am not persuaded that the procedures applicable to the rental pool mechanism require any different application in this case. I conclude that Rule 7.6 of the Committee of Nine, even if interpreted as holding that undelivered water is returned to the storage from where it originated, has no application to the circumstances of this case. This rule applies only to rental pool water

that is not delivered. Here, the water was delivered by the irrigation districts to the canal companies.

As a practical example, to accept the arguments of the irrigation districts would mean that water being delivered from the canal companies in the second year – 2002 in this case – would apparently come out of the canal companies' storage at American Falls – this would be the “first water available” to the canal companies in the irrigation seasons 2002, and would be from the farthest downstream reservoir that was “easiest to fill.” If the irrigation districts could direct that this water be returned to their storage space at Palisades Reservoir, it would mean that the Watermaster would have to devise a means to run the water uphill from American Falls to Palisades, which in turn would mean that the Watermaster would have to work some sort of exchange with another user with diversion point above Palisades to accomplish the upstream fill.<sup>31</sup>

If the districts could direct that the water be allocated to storage at Palisades, the water would be coming out of a storage with a 1921 priority of one user and would then be placed into spaces with priority dates of 1939 of another user. Since the undisputed testimony at hearing was that there was no new fill at Palisades in 2002, such an allocation to the irrigation district would in reality work a reallocation of the existing water at Palisades, and would necessarily displace some water of other users. This displacement would then have to be reallocated, presumably to reservoirs farther upstream, but perhaps downstream – there was no clear testimony on how such a reallocation could work because all of the technical testimony from the computer technicians was that such calculations were not part of the existing Snake.stor program and could not be

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<sup>31</sup> I recognize that this is not uncommon procedure, and is the mechanism that is actually used where a user's point of diversion is upstream from the available storage location. But in such cases, as I understand, there is a physical diversion and delivery of water from the upstream point of diversion. Not so in this case, where no physical transfer of water is contemplated.

accomplished by the program as written – that the calculations would either have to be done by hand, or that the Snake.stor program itself would have to be amended or rewritten to accomplish calculations such as this.

This would create the exact set of problems that the party in intervention, Mitigation Inc., is concerned about, and contends that the Watermaster is obligated to avoid -- water being artificially transferred to displace the entitlement of other spaceholders, with the resulting reallocations up and down stream potentially impairing the rights of other spaceholders both at Palisades and in other reservoirs. I think the concerns of this argument are well founded.

In this case, the irrigation districts observed that the canal companies did not actually draw upon the water transferred, but in fact “left” it all in Palisades. They argue that since this water never left the upstream reservoir, it should simply be restored to them at the same location – in Palisades – and that no other rights would be involved. While this argument has a certain simplistic appeal, it is in reality, irrelevant. Tony Olenichak did acknowledge that if they had been advised before the end of the irrigation season, and before the WRA program was closed into Snake.stor, they could have reversed the transactions – treated them as if they had never occurred – which would have left the carryovers where they were, in Palisades. This appears to lend support to the argument that the Watermaster still could “reverse” the transactions later, and even into the next year.

I am persuaded that they could not and should not. According to the methods adopted by the Watermaster, as soon as a transfer of water right is entered into the WRA system, the physical ownership of that water is instantly deemed to be transferred to the recipient, whether the water is physically drawn out of its location or otherwise physically transferred to the recipient at that time or not. Recall that the WRA program does not track specific locations of

water during the irrigation season. This program accounts for transactions, and is in balance and satisfied as long as the entire system is in balance. It “knows” the beginning balances everywhere, keeps track of waters in and waters out, and calculates the ending balances “everywhere.” From the moment the exchange agreements were recorded by the Watermaster in 2001, all of the water covered by these agreements belonged to the canal companies and no longer belonged to the irrigation districts. The WRA program extracted this water from the irrigation districts’ entitlement as completely as if it had been physically pumped out. From then on the water existed on the accounts of the canal companies “somewhere” in the Upper Snake River Basin, according to the WRA program. As long as the water was in the system somewhere, the exact location of this water, with respect to the canal companies, was not relevant during the irrigation season and would not be relevant until the end of season, when the WRA program was closed into Snake.stor to determine and allocate the carryovers.

I understood Olenichak’s comment that they could have unwound the 2001 transactions if the water district had been advised prior to the end of the year to mean that the water district would simply have ignored these transactions – treated the exchange agreements as though they had never occurred. The transactions would either have been deleted or not entered into the WRA system at all. I take this to be an administrative accommodation, but not a true accounting of the water in and out of the system. In this case, according to the testimony, no one advised the water district that the canal companies had not withdrawn any water under the exchange agreements, so there was no basis for Olenichak to unwind the transactions. No one suggests that he could have or should have unwound these transactions without being properly informed, and no one has argued that he, or anyone else at the water district, had any duty or responsibility to independently investigate whether the canal companies had actually drawn out water covered by

the exchange agreements. Whether they actually diverted the water out or not, it belonged to them and was subject to being accounted for in the Watermaster's accounting system at the end of the season, along with the transactions of all of the other users throughout the Upper Snake River Basin.

Certainly once the books had been closed, the carryovers calculated, the fill levels of all the reservoirs established, the carryover allocations made, the reports prepared, and the results disseminated throughout the water district to all the users and others interested in the status of the water resources and the results of the operations for the Upper Snake River Basin, it would be too late just to ignore these transactions or try to erase them.

The conclusion I draw from all of this is that the Watermaster's method of accounting for the exchange transfers was appropriate and proper. I further conclude that the method applied by the Watermaster was consistent with the language of the agreements as written, notwithstanding that the results may have been contrary to the expectation of the irrigation districts. Finally, I conclude that the methods of accounting for the allocation of storage waters requested by the irrigation districts would not be appropriate or proper in that such could result in situations where the rights of other users and/or other spaceholders would be impaired.

### **Conclusions of Law**

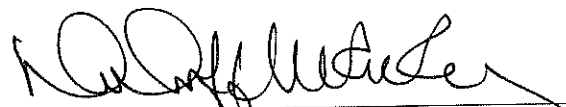
1. Based upon the foregoing analysis, I conclude that the Watermaster correctly accounted for the water transactions between the subject irrigation districts and the subject canal companies for the temporary transfers of water and water rights during the irrigation seasons 2001, 2002 and 2003, all in accordance with his statutory responsibility for the proper administration of Water District No. 1.

2. I further conclude that the methods requested by the irrigation districts would be contrary to the Watermaster's established rules and protocols for the administration of water among all users and spaceholders in Water District No. 1, and would not be acceptable management practice for the Watermaster because it would open the way for individual users to manipulate seniority rights, to the potential impairment of other users and spaceholders in the system.

### **Recommendation for Entry of Order**

I recommend that the Director enter a final order sustaining the methods followed by the Watermaster, Ronald D. Carlson, in accounting for the exchange transactions between A&B Irrigation District and Falls Irrigation District, the complaining parties herein, and Twin Falls Canal Company, Northside Canal Company and Aberdeen-Springfield Canal Company, during the irrigation seasons 2001 through 2003.

Dated this 21<sup>st</sup> day of April, 2005.

  
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D. Duff McKee, Hearing Officer

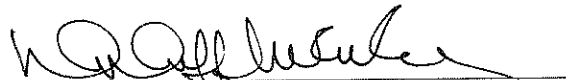
### Statement of Available Procedures

This is a recommended order of the hearing officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this recommended order will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the agency head or designee on any issue in the proceeding.

If no party files exceptions to the recommended order with the agency head or designee, the agency head or designee will issue a final order within fifty-six (56) days after: i. the last day a timely petition for reconsideration could have been filed with the hearing officer; ii. the service date of a denial of a petition for reconsideration by the hearing officer; or iii. the failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Dated this 21<sup>st</sup> day of April, 2005.

  
D. Duff McKee, Hearing Officer

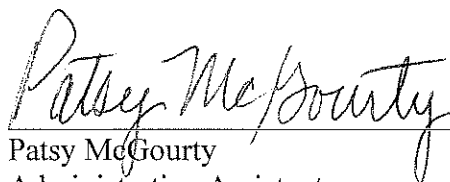
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2005, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

DAVID BARBER  
OFFICE OF THE ATTORNEY GENERAL  
STATEHOUSE MAIL  
BOISE ID 83702

ROGER D. LING ESQ.  
LING ROBINSON & WALKER  
PO BOX 396  
RUPERT ID 83350

JERRY R. RIGBY, ESQ.  
RIGBY THATCHER ANDRUS  
PO BOX 250  
REXBURG ID 83440-0250

A handwritten signature in cursive script, reading "Patsy McGourty", is written over a horizontal line.

Patsy McGourty  
Administrative Assistant  
Idaho Department of Water Resources